Office Supreme Court U. S.
FILED,
APR 24 1890.
JAMES H. McKENNEY,
CLERK.

No. 141.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1889.

JOHN O'NEIL, PLAINTIFF IN ERROR,

vs.

THE STATE OF VERMONT.

In Error to the Supreme Court of the State of Vermont.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States

OCTOBER TERM, A. D. 1889.

JOHN O'NEIL, Plaintiff in Error,

vs.

STATE OF VERMONT, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This writ of error is brought to review a decision and judgment of the Supreme Court of Vermont, rendered upon the following state of facts taken from the record:

The case is a criminal prosecution in the name of the State of Vermont, against the plaintiff in error, for a violation of chapter 169 of the Revised Laws of Vermont, which are hereinafter cited so far as the same seems to be material. The prosecution was commenced by complaint of a town grand juror, to a justice of the peace, and upon a hearing the justice found the plaintiff in error guilty of four hundred and fifty-seven offenses of selling intoxicating liquor and sentenced him to pay a fine of nine thousand one hundred and forty dollars, and costs amounting to the additional sum of four hundred and seventy-two dollars and ninety-six cents, and to be confined at hard labor for one month, and in case the fine and costs were not paid before the expiration of that term of imprisonment, the sentence requires that the plaintiff in error be confined at hard labor for a further period, aggregating a total penal servitude of a little over seventy-nine years.

From this judgment and sentence the plaintiff in error appealed to the County Court, a court of record having a general civil and criminal jurisdiction. Upon trial in that court the following facts are found and put upon the record:

The plaintiff in error, John O'Neil of Whitehall, in the County of Washington and State of New York, was at the time of trial a wholesale and retail dealer in wines and liquors at said Whitehall, and had been so engaged in business there for more than three years then last past, and that said business by him carried on was a lawful and legitimate business under the laws of the State of New York, as conducted by him there.

That during the three years next preceding the time of trial, the plaintiff in error had received at his store in said Whitehall, three hundred and seven separate and distinct orders by mail, telegraph and express, for specified and designated small quantities of intoxicating liquors, from as many different persons, residing in Rutland in the State of Vermont. The orders sent by express were in the form of a letter addressed to said John O'Neil at Whitehall, and such letter was attached to a jug, and the jug with the letter attached was delivered by the parties sending the same to the National Express Company in said Rutland, and charges thereon paid by the parties so sending the order. Orders sent by mail were by letters or postal cards deposited in the government postoffice at said Rutland, directed to John O'Neil at Whitehall, New York, and postage paid thereon. Orders sent by telegraph were delivered by the sender at the telegraph offices in said Rutland, directed to said John O'Neil, Whitehall, New York, and charges paid by the sender, which orders requested the said O'Neil to send said intoxicating liquors to the parties ordering the same at said Rutland, and in more than half the number of instances, said orders directed him to send said liquors by express C. O. D., and in other instances, where the orders did not specify, it was the intention of the purchaser to have the goods so sent to him.

It is the usual course of trade for merchants receiving an order from a considerable distance for goods in small quantities to send the same by express, C. O. D., when the order is not from a regular customer or a party of known responsibility.

That upon the receipt of said orders the plaintiff in error in each case measured out the liquors called for in the order at his store in Whitehall aforesaid, and packed the same in jugs or other vessels and attached to each package a tag, upon which was written the name and address of the party ordering the same, and delivered each package so directed and addressed at Whitehall aforesaid, to

the National Express Company, a New York corporation, a common carrier doing business between the city of New York and Montreal, Canada, and including the route between said Whitehall and said Rutland; and each of said packages also had upon said tag the name and business card of said O'Neil, and none of said packages were in any manner disguised, and all of them were sealed with wax. It was not stated on the jugs or tags what they contained.

The plaintiff in error, at the time he delivered said goods to the express company, also delivered to said common carrier a bill of the goods. The said O'Neil did nothing to or with said liquors after the said packages were delivered by him at said Whitehall to said common carrier, and the several consignees received the same and made payment to the common carrier for said liquors at Rutland, as and under the contract made as aforesaid, through their said orders so sent to said O'Neil at Whitehall. The plaintiff in error gave no special directions as to any of the packages shipped as aforesaid.

The foregoing are all the facts in any way connecting the plaintiff in error with the sale or shipping of the liquors.

The case further finds the course of business of the common carrier with reference to goods shipped C. O. D., and that when these goods and bills were delivered to the common carrier, said carrier placed said bill for each package in an envelope marked C. O. D., which envelope had endorsed thereon among other things, the following instructions: "Do not deliver the whole or any part of the goods accompanying this bill until you receive pay therefor. Be careful to notice what money you receive, and, as far as practicable, send the same as received and follow the special instructions of the shipper, if any are given, on the bills. If goods are refused, or the parties cannot be found, notify the office from whence received, with names and dates, and await further instructions." Meaning thereby that said express company should receive the amount of said bill upon the delivery of the package to the consignee, and that without payment of said bill the said liquor should not be delivered; that in the usual and ordinary course of business of said carrier in such cases, the said express company delivered each of said packages to the consignee named upon said tag, at Rutland, and at the same time and concurrently with such delivery received the amount of the said bill in the C.

O. D. envelope, the amount of the freight for the transportation of said package from Whitehall to Rutland, and the charges for returning said money to the respondent at Whitehall. The express company placed said money for the payment of said bill in the same envelope and returned it to the defendant at Whitehall.

That it is the usual and ordinary course of business of said express company, in case goods are refused or the consignees can not be found, for the office to which goods are sent to notify the office from which they were shipped to notify the consignor of the facts, and the consignor would be consulted and his orders taken and followed as to the disposition of the goods, and this would be the same whether goods were shipped C. O. D., or otherwise.

Upon this state of facts the County Court charged the jury that if they believed the facts set forth in said admission to be true, that the same made a case upon which the jury should find a verdict of guilty, whereupon the jury returned a verdict of guilty as shown by the record, and upon that verdict the court pronounced a sentence that the plaintiff in error pay a fine of six thousand one hundred and forty dollars, with costs, four hundred and ninety-seven dollars and ninety-six cents, and that unless paid before the 20th day of March, 1883, at three o'clock in the afternoon of said day, that said John O'Neil be confined at hard labor in the House of Correction for the term of 19,914 days, or a period considerably over fifty-four years.

To this judgment exceptions were taken and the Supreme Court of Vermont affirmed the judgment in an opinion hereto attached.

The law of Vermont under which this prosecution was commenced and conducted, is found in Chapter 169 of the Revised Laws of that State, and reads as follows:

Section 3800. No person shall, except as specially provided, manufacture, sell, furnish or give away, by himself, clerk, servant or agent, spirituous or intoxicating liquor, or mixed liquor of which a part is spirituous or intoxicating, or malt liquor or lager beer; and the phrase "intoxicating liquors" where it occurs in this chapter shall be held to include such liquors and beer.

The word "furnish," where it occurs in this chapter shall apply to cases where a person knowingly brings into or transports

within the State for another person intoxicating liquor intended to be sold or disposed of contrary to law, or to be divided among or distributed to others.

The words "give away," where they occur in this chapter, shall not apply to the giving of intoxicating liquor at private dwellings, or their dependencies unless given to an habitual drunkard, or unless such dwelling or its dependencies become a place of public resort.

But no person shall furnish or give away intoxicating liquor at an assemblage of persons gathered to erect a building or frame of a building, or to remove a building, or at a public gathering for amusement.

Nothing in this chapter shall prevent the manufacture, sale and use of wine for the commemoration of the Lord's supper, nor the manufacture, sale and uses of cider, or, for medical purposes only, of wine made in the State from grapes or other fruit, the growth of the State, and which is without the admixture of alcohol or spiritous liquor, nor the manufacture by any one for his own use of fermented liquor.

But no person shall sell or furnish cider or fermented liquor at or in a victualing house, tavern, grocery, shop, cellar, or other place of public resort, or at any place to an habitual drunkard.

Sec. 3802. If a person, by himself, clerk, servant or agent, sells, furnishes or gives away; or owns, keeps or possesses with intent to sell, furnish or give away, intoxicating liquor or cider in violation of law, he shall forfeit for each offense to the State, upon the first conviction ten dollars and costs of prosecution; on the second conviction he shall forfeit for each offense twenty dollars and costs of prosecution, and shall also be imprisoned one month; and on the third and subsequent convictions he shall forfeit for each offense twenty dollars and the cost of prosecution, and shall also be imprisoned not less than three months nor more than six months.

The complaint in this prosecution against the plaintiff in error charges him only with the commission of the acts named in the prohibition clause of section 3800, to wit: that, "he did, at divers times, sell, furnish and give away intoxicating liquors without authority."

The form of complaint used is a statutory form given for the prosecution of offenses under section 3,800, above recited, to recover the forfeiture and inflict the penalty provided in section 3,802 aforesaid.

The Supreme Court of Vermont, in affirming the judgment of the lower court, held that the sales of intoxicating liquor in the State of New York under the orders sent from Vermont, and the delivery in Vermont by the common carrier to the person ordering

the same, and collecting and returning the pay therefor from the Vermont purchasers to the New York merchant, in the usual course of business between the States, was a violation of the statutes cited under the complaint referred to, and that such facts constituted a crime under said statutes, and thereby the plaintiff in error was guilty of three hundred and seven offenses of selling intoxicating liquor without authority.

The question raised for consideration and decision of this court is this:

Is this Statute of Vermont, as construed and applied by the highest court of the State, repugnant to the constitution of the United States?

The errors relied upon specified, attached to the writ of error in this case, and contained in the record, are:—

1st. That the court below held and adjudged that the sales of intoxicating liquor in New York, by a citizen of that State lawfully, was a crime under the laws of Vermont, when said liquor so sold, was shipped C. O. D., to the purchaser in Vermont, by his direction.

2d. That the court held that a shipment from that State, to a purchaser in Vermont, under the facts of this case, was a crime under the statute of Vermont, which could be punished by the courts of that State.

3d. That the court adjudged that said statute was not in conflict with the clause of the constitution of the United States, which gives the Congress power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

5th. That the court held that the construction it gave to the statute, and its application to the facts, is not to conflict with Sec. 8, of Article 1, of the constitution of the United States.

These specifications of error in the record are intended only as different specifications of one and the same question, to wit:

Is the statute of Vermont under which this prosecution proceeds, as construed and applied in this case by the highest court of the State, repugnant to that clause of the constitution of the United States, which provides, among other things, that the Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes?

The Supreme Court of Vermont held this statute valid as against this objection.

I.

The 8th section of Article I of the Constitution of the United States provides:

The Congress shall have power

* * * * * * * *

To regulate commerce with foreign nations, and among the several states and with the Indian tribes.

* * * * * * * *

This clause of the Constitution has a force, given it by the history of the times in which it was formed, and by the evils it was destined to correct, that is far reaching and important, and no rule of interpretation is more unchangingly grounded in wisdom, or more securely entrenched behind judicial opinion, than the one that takes note of these things.

At the commencement of the American Revolution the thirteen British Colonies were so many independent political communities. They enjoyed the protection of Great Britain against international danger, and to some extent against dissentions among themselves; but with reference to all internal matters they were, as between themselves, sovereign and independent.

2 Madison Papers, 686.
1 Curtis Hist. Const., 3.

In the matter both of foreign and domestic or inter-colonial commerce the colonies were independent of each other and in a great degree of the mother country. There was no general authority over commerce; jealousies and conflicts were the natural and necessary result. The foreign and inland commerce of some of the colonies, from their peculiar geographical situation, was subject to be and was in fact interfered with by taxation and otherwise. Irritation and retaliation followed. The history of the period informs us that "New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms."

Dissatisfaction and discord was the logical consequence of this condition. The statesmanship of the times sought relief in the adoptions of the Articles of Confederation. This, however, did not secure a remedy, for it did not meet the evil. It left the new states free to do precisely what the colonies had done, and for the correction of which the articles of Confederation were adopted. The only limitation under those articles were that "no imposition, duties or restrictions shall be laid by any state on the property of the United States, or either of them," and "no State shall lay any imports or duties which may interfere with any stipulation in treaties entered into by the United States in Congress assembled." This left the property of individuals constituting really the entire commerce between the states subject to the same conflicting and discriminating regulations of the States as before. The only power over the subject of commerce conferred upon Congress was, to "enter into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing imports and duties on foreigners as their own people are subject to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.

Articles of Confed. IV, VII and IX.

In the midst of the thorough dissatisfaction which arose from the want of harmonious action of the States over the subject of trade and commerce, the policy of fostering the productions of different states as against the general welfare prevailed, and protests from several State Legislatures filled the air with alarms. It was upon this subject that Washington said:

I think often of our situation, and view it with concern. From the high ground we stood upon, from the plain faith which invited our footsteps to be so fallen, so lost, is really mortifying; but virtue has in a great degree taken its departure from our land, and want of a disposition to do justice is the source of the national embarrassment.

Washington's Writings, IX, 167.

The movement for relief was inaugurated by Virginia. Eight commissioners were appointed by that commonwealth with Madison at the head to meet such commissioners as might be appointed by the other States "to take into consideration the trade of the United States; to examine the relative situation and trade of said States; to consider how far a uniform system of their commercial regulations may be necessary to their common interests and their permanent harmony; and to report to the several States such an act relative to this great object as, when unanimously ratified by them, will enable the United States in Congress assembled effectually to provide for the same.

1 Curtis Hist. Const., 343.

2 Madison Papers, 695.

After many meetings and much correspondence, the convention that framed the Constitution came together.

Prior to the meeting Madison wrote to Governor Randolph:

"Let the National Government be armed with positive and complete authority in all cases where uniform measures are necessary, as in trade, etc."

Towles' Hist. Const., 253.

The scheme known as the Virginia plan proposed to empower Congress:

"To regulate commerce with all nations and among the several States."

2 Madison Papers, 740.

New Jersey presented its scheme expressed in this way:

"To pass acts for the regulation of trade and commerce as well with foreign nations as with each other."

Towles' Hist. Const., 259.

It is said that in the debates in convention no objection of any character was urged to the full, exclusive and complete delegation of this power over commerce among the States to Congress,

and that but one suggestion was made that any concurrent authority over the subject should remain in the States, and that suggestion met with no favor.

24 American Law Review, 34.

The evil to be remedied, the language used, the debates in convention, and arguments used to the States to procure a ratification of the Constitution, all concur in giving weight to that interpretation of this clause, which takes from the States all power over the subject of commerce among the States, and gives to Congress the sole and exclusive authority to regulate it, or to prohibit it.

This court has had this subject before it very frequently in late years, and although all its utterances cannot be harmonized on abstract propositions, there seems to be certain propositions arising and decided in the cases, that throw a strong light upon the question we have here, and as we claim, practically decide it.

Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of one country and the citizens or subjects of other countries and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. The commerce between the States, which consists in the transportation and exchange of commodities, is of national importance and admits and requires uniformity of regulation.

Welton v. State of Missouri, 91 U. S., 275.

The later decisions of this court are uniformly to the effect that the States cannot prohibit or regulate commerce among the States directly, or indirectly, and that non-exercise by Congress of its power to regulate commerce between the States is equivalent to a declaration that such commerce shall be free.

Welton v. Missouri, *supra*.
Machine Co. v. Gage, 100 U. S., 676.
County of Mobile v. Kimball, 102 U. S., 691.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196.
Brown v. Houston, 114 U. S., 622.
Pickard v. Pullman Southern Car Co., 117 U. S., 34.
Robbins v. Shelby Taxing Dist., 120 U. S., 489.

A State statute requiring that a bill of lading for goods to be transported from one State to another should pay a stamp tax was held to be invalid as a regulation of commerce.

Almy v. State of California, 24 How., 169.
Woodruff v. Parham, 8 Wall., 123.

The transportation of freight, or of the subjects of commerce, is a constituent part of commerce itself. A tax upon freight transported from state to state is a regulation of commerce among the states. Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress. Transportation of passengers or merchandise through a state, or from one state to another, is of this nature; hence a statute of a state imposing a tax upon freight taken up within the state, and carried out of it, or taken up without the state and brought within it, is repugnant to that provision of the constitution of the United States which ordains that Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes.

State Freight-Tax Case, 15 Wall., 232.

Commercially these United States are one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow. This is demanded by the general welfare and is dictated by the spirit of the Constitution, and any local interference with it cannot be tolerated.

Railroad company v. Maryland, 21 Wall., 456.

The States cannot be permitted, under the guise of a tax upon business transacted within its borders, to impose a burden upon commerce among the States, when the business so taxed is interstate commerce.

Fargo v. Michigan, 121 U. S., 230.

In Moran v. New Orleans, 112 U. S., 69, this court holds that a municipal ordinance of the City of New Orleans, to establish the rate of license for professions, callings and other business, which assesses and directs to be collected from persons owning and running tow boats to and from the Gulf of Mexico and the city of New Orleans, is a regulation of commerce among the States, and void.

Commerce among States consists of intercourse and traffic between their citizens and includes the transportation of persons and property, and the navigation of public waters for that purpose as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety, while with reference to some of them, which are local and limited in their nature or sphere of operations, the States may prescribe regulations until Congress intervenes and assumes control of them, yet when they are national in character and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country, and it needs no argument to show that the commerce with foreign nations and between the States which consists in the transportation of persons and property between them is a subject of national character and requires uniformity of regulation. Congress alone, therefore, can deal with the question.

Ferry Co. v. Pennsylvania, 114 U. S., 196.
Steamship Co. v. Pennsylvania, 122 U. S., 326.

It is not in the power of a state legislature to impose restrictions upon telegraphic messages from one state to another.

Telegraph Co. v. Texas, 105 U. S., 460.
Railroad v. Illinois, 118 U. S., 557.
Telegraph Co. v. Pendleton, 122 N. S., 347.
Leloup v. Port of Mobile, 127 U. S., 640.

The orders sent by the Vermont consumers of the plaintiff in error, to him at Whitehall, by telegraph, express and through the United States mails, were an incident and means of commerce between the states, and the state of Vermont could not prohibit or regulate them, or tax them to the extent of a penny. In accordance with those orders the plaintiff in error, as he lawfully might, filled the orders and returned the goods by common carrier across the state line to his customers.

This traffic is commerce. The intercourse through these orders and the sending of the goods in response to them, is the ordinary and usual course of commerce. It is inconceivable that these orders, protected by the interstate commerce clause of the constitution, for the purpose that they should have efficiency as a means of commerce among the states, become subject to be annulled and made illegal at the point when the continuance of the intercourse is indispensable to the consummation of the negotiation in that trade. It is a mockery to say that the state cannot interfere with the use of the telegraph and common carriers, for the purposes of commerce among the states, and at the same time hold that the participants in that commerce may be fined and imprisoned in the state for doing what the state cannot regulate or tax.

It is not material that the penalty denounced against this commerce, does not discriminate against the citizens or productions of another State. The State may tax its internal commerce, but if an act to tax interstate commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. If the State choose to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it a similar condition for allowing transportation wholly within the State. The inflicting a penalty by the State for transacting an interstate commerce business is not rendered constitutional and valid by imposing the same penalty for doing the same business wholly within the State.

Railroad Company v. Illinois, 118 U. S. 557.
Robbins v. Shelby Taxing Dist., 120 U. S., 489.
Fargo v. Michigan, 121 U. S., 230.
Asher v. Texas, 128 U. S. 129.
Stontenburgh v. Hennick, 129 U. S. 141.
See also, *In re* Barber, 6 Railway & Corp., L. J., 367.
Swift v. Sutphen, 6 Railway & Corp., L. J., 382.

The authorities above cited preclude the argument before this court, that the State has power to prohibit or regulate interstate commerce, by any manner of indirection, or colorable enactment as well as to express statute.

The sections of the Vermont law, already cited, in connection with sec. 3830, in the same chapter, show the legislative purpose. The section last referred to reads as follows:

Sec. 3830. If a person knowingly brings within the State, for another person, except authorized agent, intoxicating liquor to be used or disposed of in violation of law, or knowingly procures or transports for another person, or knowingly aids, assists or abets in procuring or transporting intoxicating liquor to be used or disposed of in violation of law, he shall forfeit twenty dollars and costs of prosecution, on the first conviction, and on the second and each subsequent conviction fifty dollars and costs, and be imprisoned not less than three nor more than ten months.

The statute denounces its penalty in sections 3800 and 3802, against the person who brings into the State for another person any intoxicating liquor intended to be sold or disposed of contrary to law, or to be divided among or distributed to others, as being within the definition of "furnishing."

The complaint is for selling, furnishing and giving away of intoxicating liquors, and the County Court charged the jury that the facts set forth in the admission made a case upon which the jury should find a verdict of guilty.

This statute also discriminates against wine made out of the State or made from grapes or other fruit grown out of the State.

The case does not show what intoxicating liquors were included in these orders. The statute classes wine made out of the State or made from grapes or other fruit not grown in the State as intoxicating liquors, and the goods in question may or may not have been this kind of wine.

The highest court of the State construes those two sections, 3,800 and 3,802, as being a prohibition of a merchant in New York sending into Vermont goods by him dealt in lawfully where he resides, by express transportation companies, upon orders received through the United States mails in the regular course of commercial business. And also where the orders are by telegraph or express.

It cannot be said that the statute does not prohibit this commerce between the States, because the highest court of law in the State has deliberately adjudged in this case, that such is its force and effect. It is the special province of the State courts to construe and give the legal meaning of the State legislation, and this court accepts the judgments of those courts as conclusive interpretations of the constitutional and statute law of the St[illegible] received construction of the statute law of a State by the courts of that State, is the statute law of the State, however much this court may doubt the propriety of that construction.

Shelby v. Guy, 11 Wheaton, 367.
Christie v. Pridgeon, 4 Wall., 196.

II.

It is claimed there is a conflict here, between the authority of Congress to regulate commerce among the States, and the police power which by the Constitution is reserved to the individual States; and in case such a conflict is found, the question is submitted, as to which is the supreme law of the land, and which, if either, must give way to the other.

The government of the United States is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined in the Constitution, it is supreme and above the States. The Federal Government is one of delegated powers, supreme in its sphere and nothing beyond.

United States v. Cruikshank, 92 U. S., 542.

The Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which may be made, under the authority of the United States, shall be the supreme law of the land, binding all judges, National and State, the Constitution and laws of any State to the contrary notwithstanding.

Article 6, Const. U. S.

Whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. Therefore this court held that for the purpose of guarding the state from the Spanish or Texas fever, an act prohibiting the introduction into the state of all Texas, Mexican or Indian cattle during eight months of the year, except as they should be carried through the state loaded upon railroad cars or steamboat, without being unloaded, was unconstitutional and void, as being in conflict with that clause of the constitution giving Congress power to regulate commerce, etc.

Railroad Co. v. Husen, 95 U. S., 465.

The act of Louisiana, as construed by the highest court of the state, which required those engaged in the transportation of passengers among the states, to carry colored passengers in Louisiana in the same cabin with whites, was held void as being in conflict with the power of Congress.

Hall v. DeCuir, 95 United States, 485.

No one questions that the police power is left to States as the Constitution found it. Whenever a thing from character or condition is of a description to be regulated by that power in the State, that regulation may be made by the State and Congress cannot interfere. But this must always depend upon facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of the commerce among the States. If from its nature it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or, in other words is not a commercial article, then the State power may exclude its introduction. And as incident to that power the State may use means to ascertain the fact. This is the limit between the sovereign power of the State and the Federal power. As we have seen in *Railroad v. Husen*, the State cannot declare that certain breeds of cattle are not articles of commerce, but they may inspect them and exclude such as are diseased.

The State cannot declare that paper rags must not be brought into the State, but it may inspect them, and prevent any coming in that has the germs of yellow fever, small pox, or other contagious or infectious disease.

The legislature of a State cannot in the exercise of the police power declare that intoxicating liquors are not subjects of commerce. That question must rest on the fact of whether the article is a subject of trade and exchange in the commercial world.

This law of Vermont is not an inspection law; it is not a quarantine law. It is a regulation of commerce among the States, within any definition heretofore given to that term, or which can be given. We have nothing to do with the policy of a statute prohibiting the sale or drinking of liquors, or any attempt of a State to regulate real or supposed extravagance in food or clothing. We can only discuss the question of the power delegated to Congress, and from that must come the conclusion that the State is without power to prohibit the commerce among the States in the recognized articles of commerce, as carried out and consummated in this case.

Walling v. Michigan, 116 U. S., 446.

Bowman v. Railway Co., 125 U. S., 465.

It cannot vary the question to say that when the goods were sent C. O. D. the common carrier became the agent of the plaintiff in error, to take the liquors ordered from the store in New York and deliver them to the purchaser and collect the pay for them. If this business was interstate commerce, if the liquors were paid for in advance, or sold upon credit, the character of the transaction in that respect is not changed by their being sent, under the ordinary and usual methods of that commerce for collection to be made by the carrier on delivery.

It is a sale, part of the business being done in one State and part in another, with a transportation of the goods by common carrier from the seller to the buyer across State lines.

It will be argued by defendant in error that in transporting these liquors from the store of O'Neil in New York to the purchasers in Vermont, the common carrier acted as agent for the seller, and that therefore the act was the same in principle as it would have been if O'Neil had gone into Vermont and opened a store for the sale of liquors. This claim is in direct contradiction of the record. On page 7, in the bill of exceptions, it is said that

this transaction was in the usual course of trade of merchants receiving an order from a considerable distance, etc., and on page 8 of the record it is stated that the plaintiff in error did nothing to or with the goods after they left his store in Whitehall, and gave no special direction as to any of the packages shipped by him.

But if the position claimed could be sustained, and thereby the plaintiff in error be made constructively guilty through his agent the common carrier, of a violation of sec. 3,800, in furnishing the liquors, or of bringing into the State liquors for another person as prohibited in sec. 3,830, we say that those two sections as applied to the facts in that view would be equally in violation of Section 8 of Article 1 of the Federal Constitution.

III.

Question is made that this cause should be dismissed, for the reason that the record fails to show any Federal question raised within the meaning of sec. 709 of the Revised Statutes.

In the discussion of this question the record is the guide. The facts hereinbefore stated show that the citizenship of the parties, the nature and character of the commerce between the plaintiff in error in New York with his customers in Vermont, through the sole medium of the United States mails and other common carriers, is made emphatic, and no question really appears in the statement of facts, and the record, except the one of whether this commerce as conducted by plaintiff in error, among the States, can be prohibited or regulated by the law of Vermont, under which this prosecution is conducted.

This transaction necessarily shows a commerce among the several states. It has all the elements of interstate commerce, and the Supreme Court of Vermont could not have rendered the decision it did, without deciding that this class of interstate commerce was prohibited or regulated by the Statute of Vermont under which the plaintiff in error was prosecuted, unless it decided that such dealing was not commerce among the several States.

The Federal question need not be formally raised; but it is sufficient if it appears by clear and necessary intendment that a Federal question was raised and presented to the State Court.

Murray v. Charlestown, 96 U. S., 442.
Canal Co. v. Superior Court, 116 U. S., 410.
Arrowsmith v. Harmoning, 118 U.S., 194.

Since the brief for plaintiff in error was filed in this cause, the question involved in point II. has been further considered by this court, and reference is here made to those cases as sustaining the legal position for which we contend.

Leisy v. Hardin, 135 U. S., 100.
Lyng v. Michigan, idem, 161.

the jury should find a verdict of guilty, and to the rendition of the judgment upon the verdict directed as stated in the record.

The exception reached every ground of the judgment. Every question involved in the rendition of the judgment is reached by an exception to its rendition.

Farrant v. Bates, 60 Vermont, 37.

The Federal question was fully argued in the Supreme Court.

State v. O'Neil, 58 Vermont, pp. 150, 154.

The Federal question was decided by the Vermont Supreme Court.

The Statutes of Vermont do not require the opinions of the judges in the decision of causes to be filed and recorded by the clerk as part of the records of the cause, but do require such opinions to be prepared and published.

Sections 807, 808 and 809 of the Revised Laws of Vermont read as follows:

Sec. 807.—The judges of the Supreme Court shall biennially appoint a reporter of the decisions of the Court, and may fill a vacancy in such office.

Sec. 808.—The judges shall prepare and furnish to the reporter, on or before the first day of October in each year, reports of the opinions by them severally given, and shall within the same time furnish to the auditor of accounts a certificate that they have complied with this provision, or been prevented by sickness or other unavoidable cause from such compliance; and the auditor of accounts shall not draw an order for the last quarter of the annual salary of a judge until such certificate has been furnished by such judge.

Sec. 809.—The reporter shall annually prepare the decisions of the Court for publication, and shall read the proof, and shall superintend the printing and binding thereof; and all cases decided shall be reported within one year after the decisions are made.

In accordance with this statute Chief Justice Royce prepared and delivered to the reporter the opinion of the Supreme Court in this case, and the same was published in Vol. 58 Vermont Reports, at page 140, a copy of which, duly certified by the Chief Justice, is hereto attached.

In that opinion the Supreme Court of Vermont does decide and pass upon the Federal question, which the facts show by necessary implication must have been passed upon.

The opinion upon the question reads:

III. Concerning the claim that sec. 8 of the Federal Constitution conferring upon Congress the exclusive right to regulate commerce among the States, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted. If an express company, or any other carrier or person, natural or corporate, has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within this State, it is a necessary incident to the police power of the State that such article should be subject to seizure for the protection of the community. * * * If it were competent for persons or companies to become superior to State laws and police regulations, and override and defy them under the shield of the Federal Constitution simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. * * * *

This opinion shows, in express terms, that there was drawn in question the validity of a statute of the State of Vermont, as applied by that court, on the ground of its being repugnant to a particular clause of the Constitution of the United States, and the decision was in favor of its validity.

This court may look at that opinion. The act of 1867, omitting the clause in the act of 1789, confining the court to the face of the record, authorizes the court to examine the opinion of the State court published in accordance with the State law, to ascertain the grounds of the judgment of the State court.

Kreiger v. Railroad Company, 125 U. S., 39.

By his Attorney,

JOEL C. BAKER.

The following is a true copy of the opinion of the court, delivered in this cause by Chief Justice ROYCE, as prepared by him and furnished to the reporter, and published in volume 58 of the Vermont Reports, in accordance with the Statute law of the State of Vermont.

The opinion of the court was delivered by

ROYCE, Ch. J. The first and most important question presented by these cases is whether or not the intoxicating liquors in question were (in the first two cases) in contemplation of law sold, or furnished, by the respondent in the County of Rutland, and State of Vermont; or (in the last two cases) held and kept for the purpose of sale, furnishing or distribution contrary to the statute, within said County and State. The answer depends upon whether the National Express Company, by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the State of New York, so that upon delivery of them to the express company for transportation, the title vested in the consignees, as in the case of a completed and unconditional sale, then no offence against the laws of this State has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the County Court upon the question of the offense were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper, in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill, or invoice, for collection. The shipment was in each instance, which it is necessary here to consider, "C. O. D.;" and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

Whether or not, and when, the legal title in property sold passes from the vendor to the vendee, is always a question of the intention of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by MORTON,

J., in *Mason* v. *Thompson*, 18 Pick., 305: "The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point; and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform upon this point; and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. Benj. Sales, ss. 311, 319, note (c). When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession. Benj. Sales, s. 320, note (d). The Vermont cases to the above points are referred to in Roberts' Digest, 610 *et seq.*, and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely: payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was *intended* by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention *not* to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale, therefore, remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and

complete by their delivery to the consignee. There was a completed executory *contract* of sale in New York; but the completed *sale* was, or was to be, in this State.

The authorities upon the above points and principles are so numerous, and are so fully collated in the brief of the learned counsel for the State, and in the text and notes of 2 Benj. Sales (4 Am. ed.), that we refrain from specific references in support of the conclusions at which we have arrived. These are fully supported by the decision of the U. S. District Court in Illinois, in *People* v. *Shriver*, 31 Alb. L. J., 163, a case involving precisely the same question. TREAT, J., says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company, as the agent of the seller, until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield, to the defendant at Shawneetown, for two gallons of liquor, to be shipped to Fairfield, C. O. D., is a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield, and a shipment by the defendant, according to such order, is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price for it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor to the person ordering, whether such order was accompanied by the money or not. The moment the liquor under such an order was delivered to the express company at Shawneetown, it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser—the sale would be a sale at Shawneetown—and if it were lost or destroyed in transit, the loss would fall upon the purchaser. But in the case at bar, the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit, the loss would have fallen on himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor.

II. It is insisted on the part of the claimant in the case of the *State* v. 68 *Jugs, etc.*, that sec. 2 of No. 43 of the Acts of 1882, under which the liquors in that case were seized, is unconsti-

tutional. Conceding the points contended for by the learned counsel for the claimant, that there is a well recognized right of property in intoxicating liquors, that they are not *malum in se*, and that their use is not by law prohibited to citizens of this State, these propositions are nevertheless clearly subject to the qualification, that *when kept and intended for unlawful use*, such liquors fall at once under the ban of the law, and become subject to seizure and confiscation by such methods as are provided by law in conformity with the Constitution. That intoxicating liquors when once branded with this unlawful intent on the part of the owner or possessor, become subject to confiscation by the government; and that the methods and means of their seizure and condemnation are within the police powers delegated to the Legislature by Art. 5, Part 1, of the Constitution is too well settled in this State and elsewhere to require extended discussion. *Spalding* v. *Preston*, 21 Vt., 9; *State* v. *Conklin*, 27 Vt., 318; *id.*, 325, 327; *State* v. *Comstock*, *id.*, 553; *Gill* v. *Parker*, 31 Vt., 610; Pott. Dwarris, c. 14; Cooley Con. Lim. (4 ed.) 714, 727.

This section gives the officer the power to seize, without warrant, liquor found "under circumstances warranting the belief that it is intended for sale or distribution," contrary to the provisions of chap. 169, R. L. It does not purport to confer the power of search; nor does anything appear to show that the officer assumed to exercise such power in this case. It simply provides for the seizure, without warrant previously issued, of something which the law has declared subject to seizure and condemnation, under the police power delegated by the Constitution, as an instrument by the owner or possessor for a use unlawful by express statute, and dangerous to the peace, health and good morals of the community. That the article *in itself* may be innocuous, may be the subject of lawful ownership, or may even be susceptible of beneficial use, can no more affect the question than could the fact that certain tools were susceptible of lawful and beneficial use in mechanics, save them from becoming subject to seizure and confiscation, if intended by their owner or possessor for use as the instruments for accomplishing a contemplated burglary; or the harmless character of the metal and its owner's right of property therein protect his ownership when fashioned and intended for passing as counterfeit coin. It cannot be doubted in this State since the case of *Spalding* v. *Preston*, 21 Vt., 9; and has not been elsewhere, so far as we are aware, that articles of instrumentalities, once impressed with the characteristics of *adaptation* and *intended use* for purposes prohibited by law and contrary to public peace, health or morals, are subject to summary seizure under statutory or even general police regulations. That the liquors in question were intended for such use has been determined in this case as a question of fact by the tribunal designated by law, and that adjudication is conclusive.

The scope and application of Art. 5, Part 1 of the Constitution have been defined by this court in the cases above referred to, and *in re Powers*, 25 Vt., 265, which has ever since been regarded as conclusive against such application of that section of the bill of rights as is here contended for by the claimant. See *Gill* v. *Parker*, 31 Vt. 610; *State* v. *Peterson*, 41 Vt., 504; *State* v. *Intox. Liq.*, 55 Vt., 82. In Massachusetts a statute practically identical with the one in question, has been held not to contravene a similar constitutional provision. *Jones* v. *Root*, 6 Gray, 435; *Mason* v. *Lothrop*, 7 Gray, 354. The decisions in Maine are to the same effect. *State* v. *McCann*, 59 Me., 383; *State* v. *Howley*, 65 Me., 100.

III. Concerning the claim that sec. 8 of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the States, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted. If an express company or any other carrier or person, natural or corporate, has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police power of the State that such article should be subject to seizure for the protection of the community. It would certainly be a strange perversion of language to claim that if this express company were to hold in possession within this State clothing infected with the small-pox or yellow fever, or tools with which it was intended to commit a burglary, the State government should be powerless to protect its citizens by seizing and rendering harmless such articles, simply because they might have been brought, in the ordinary course of business, from another State. If the express company has in possession within the State liquor, *with intent to make unlawful use or disposition of it*, then the right to seize it and prevent such unlawful use attaches. If it were competent for persons or companies to become superior to State laws and police regulations, and to override and defy them under the shield of the Federal Constitution simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. The right of the States to regulate the traffic in intoxicating liquors has been settled by the United States Supreme Court in the License Cases, 5 How., 577.

IV. Proof of the former conviction in the cases of *State* v. *O'Neil* was properly admitted, notwithstanding the conviction appeared to have been more than three years before the trial. No provision of the statute requires that the former conviction must have been within three years, and we have no authority to add such a provision to the law, as it is plainly unambiguously framed by the legislature. The reason for the limitation of prosecutions for the offenses charged in these cases to a period within three years

from the the time of commission, as for all similar limitations, is that a person should not be called upon to answer to a legal accusation after such a long time has elapsed as would, in the estimation of the law, make it difficult or impossible, by reason of the death or removal of witnesses, the loss or destruction of evidence, or the various embarrassments, likely to arise from a considerable lapse of time, for him to establish his innocence. This reason has no application to a case where the only proof that can be used on the one side or the other is matter of record. We should therefore have no justification, even if we deemed it within the scope of our power and duty, for making application of a rule of limitation by analogy in these cases.

V. The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense with which the respondent O'Neil is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unusually severe for a *single* offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.

The inevitable deduction from what has been said under the first point is, that the respondent, O'Neil, by what he did in respect of the transactions in question, made the express company his agent; and as what was done by such agent in the execution of the authority and instructions directly given by him committed offenses against the statute, O'Neil must be held responsible. That he was innocent of any purpose or intent to break the law, and was unaware that what he did was contrary to law, cannot avail him in defense. *State* v. *Comings*, 28 Vt., 508.

The result is that in the cases of the *State* v. *O'Neil*, numbers 27 and 28, the respondent takes nothing by his exceptions; and in the cases of the *State* v. *Intoxicating Liquor*, National Express Company, claimant, numbers 25 and 26, the judgments are affirmed.

STATE OF VERMONT.

I, Homer E. Royce, Chief Justice of the Supreme Court of the State of Vermont, hereby certify that the foregoing is a true copy of the opinion of the court in the case of State of Vermont *v.* John O'Neil, as prepared by me and furnished to the reporter of decisions of the Supreme Court, and published in volume 58 of the Vermont Reports; I further certify that the law of Vermont does not require the opinion of the Supreme Court in the decision of causes to be filed with or recorded by the Clerk of the Court, but does require it to be prepared by one of the Judges and to be furnished the Reporter, and that the opinion in this cause was not so furnished until after the writ of error was allowed in favor of John O'Neil, Plaintiff in Error *v.* The State of Vermont, and the record transmitted to the Supreme Court of the United States, and I hereby certify this copy of the opinion at the request of the said John O'Neil, to be attachd to said record for the use of the Supreme Court of the United States.

Done at Montpelier, in the State of Vermont, this 22d day of October, 1889.

HOMER E. ROYCE,

Chief Justice of the Supreme Court of Vermont.

Office Supreme Court U. S.
FILED,
OCT 30 1889
JAMES H. McKENNEY,
CLERK.

No. 141.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1889.

JOHN O'NEIL, PLAINTIFF IN ERROR,

vs.

THE STATE OF VERMONT.

In Error to the Supreme Court of the State of Vermont.

BRIEF FOR PLAINTIFF IN ERROR.

On motion to dismiss the Writ of Error.

Supreme Court of the United States

OCTOBER TERM, 1889.

John O'Neil, Plaintiff in Error,
vs.
The State of Vermont, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

ON MOTION TO DISMISS.

The motion to dismiss the writ of error in this cause is based upon the assumption that the record fails to show that one of the questions described in Sec. 709 of the Revised Statutes of the United States arose and was decided in the State Court.

The statute of Vermont under which the plaintiff in error was prosecuted, is found in Sec. 3802 of the Revised Laws of Vermont, which reads as follows:

"Sec. 3802.—If a person by himself, clerk, servant or agent, sells, furnishes or gives away; or owns, keeps or possesses with intent to sell, furnish or give away, intoxicating liquor or cider in violation of law, he shall forfeit for each offence to the State, upon the first conviction ten dollars and costs of prosecution; on the second conviction he shall forfeit for each offence twenty dollars and costs of prosecution, and shall also be imprisoned one month; and on the third and subsequent convictions he shall forfeit for each offence twenty dollars and the costs of prosecution, and shall also be imprisoned not less than three months nor more than six months."

The testimony before the County Court, and found by the verdict under the instruction of that Court to be true, established the following facts: The plaintiff in error sold liquor at his store in the State of New York, where such trade was lawful, to citizens of

the State of Vermont, through the interposition of the United States mails and common carriers doing business between those States. The purchasers sent their orders by mail, by telegraph or by express from Rutland in the State of Vermont, to the plaintiff in error at Whitehall in the State of New York, and received their goods by common carrier in accordance with the orders. The purchasers did not go into the State of New York to make the purchases, and the plaintiff in error did nothing with the goods after putting them up in his store in New York, except to deliver them to the common carrier at Whitehall for transportation to the purchasers in Vermont, in the usual course of business.

See pp. 7 and 8 of the Record.

The Supreme Court of Vermont, upon these facts held and adjudged that they constituted a crime under the Statute referred to, and that the plaintiff in error was thereby guilty of three hundred and seven offences of selling intoxicating liquor without authority as of a second conviction, for which he is subject to forfeit to the State of Vermont the sum of six thousand one hundred and forty dollars, and be imprisoned for the term provided by the Statute.

This transaction necessarily shows a commerce among the several States. It has all the elements of inter-state commerce, and the Supreme Court of Vermont could not have rendered the decision it did, without deciding that this class of inter-state commerce was prohibited or regulated by the Statute of Vermont under which the plaintiff in error was prosecuted, unless it decided that such dealing was not commerce among the several States.

The Federal question need not be formally raised; but it is sufficient if it appears by clear and necessary intendment that a Federal question was raised and presented to the State Court.

Murray v. Charleston, 96 U. S. 432 (442).
Canal Co. v. Superior Court, 116 U. S. 410.

I.

The 8th Section of Article 1 of the Constitution of the United States provides:

"The Congress shall have power"

"To regulate commerce with foreign nations, and among the "several States, and with the Indian Tribes."

The Constitution of the United States having given to Congress the power to regulate commerce, that power is exclusive, and the fail-

ure of Congress to make express regulations indicates its will that the subject shall be left free from all restrictions or impositions, and such a law as the Supreme Court of Vermont held this to be, as that Court applied it, is repugnant to that freedom and void.

Robbins v. Shelby Taxing District, 120 U. S. 489.

The Federal question being necessarily involved in the decision of the State Court, this Court has jurisdiction to review that decision by writ of error.

II.

The Statutes of Vermont do not require the opinions of the judges in the decision of causes to be filed and recorded by the clerk as part of the records of the cause, but do require such opinions to be prepared and published.

Sections 807, 808 and 809 of the Revised Laws of Vermont read as follows:

Sec. 807.—The judges of the Supreme Court shall biennially appoint a reporter of the decisions of the Court, and may fill a vacancy in such office.

Sec. 808.—The judges shall prepare and furnish to the reporter, on or before the first day of October in each year reports of the opinions by them severally given, and shall within the same time furnish to the auditor of accounts a certificate that they have complied with this provision, or been prevented by sickness or other unavoidable cause from such compliance; and the auditor of accounts shall not draw an order for the last quarter of the annual salary of a judge until such certificate has been furnished by such judge.

Sec. 809.—The reporter shall annually prepare the decisions of the Court for publication, and shall read the proof, and shall superintend the printing and binding thereof; and all cases decided shall be reported within one year after the decisions are made.

In accordance with this Statute Chief Justice Royce prepared and delivered to the reporter the opinion of the Supreme Court in this case, and the same was published Vol. 58 Vermont Reports, at page 140, a copy of which duly certified by the Chief Justice has been filed with the record here.

In that opinion the Supreme Court of Vermont does decide and pass upon the Federal question, which the facts show by necessary implication must have been passed upon.

The opinion upon the question reads:

III. Concerning the claim that sec. 8 of the Federal Constitution conferring upon Congress the exclusive right to regulate commerce

among the States, has application, it is sufficient to say that no regulation of or interference with inter-state commerce is attempted. If an express company, or any other carrier or person, natural or corporate has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within this State, it is a necessary incident to the police power of the State that such article should be subject to seizure for the protection of the community. * * * * * If it were competent for persons or companies to become superior to State laws and police regulations, and override and defy them under the shield of the Federal Constitution simply by means of conducting an inter-state traffic, it would indeed be a strange and deplorable condition of things. * * * *

This opinion shows in express terms, that there was drawn in question the validity of a statute of the State of Vermont, as applied by that court, on the ground of its being repugnant to a particular clause of the Constitution of the United States, and the decision was in favor of its validity.

This court may look at that opinion. The act of 1867, omitting the clause in the act of 1789, confining the court to the face of the record, authorizes the court to examine the opinion of the State court published in accordance with the State law, to ascertain the grounds of the judgment of the State court.

Kreiger v. Railroad Company, 125 U. S. 39.

By his Attorney,
Charles N. Joyce

Office Supreme Court U. S.
FILED.
OCT 14 1889
JAMES H. McKENNEY.
CLERK.

No. 141.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

JOHN O'NEIL, PLAINTIFF IN ERROR,

vs.

THE STATE OF VERMONT.

In Error to the Supreme Court of the State of Vermont.

BRIEF FOR DEFENDANT IN ERROR.

On motion to dismiss the Writ of Error.

—{IN THE}—

Supreme Court of the United States

OCTOBER TERM, 1889.

John O'Neil Plaintiff in Error,
vs.
The State of Vermont, Defendant in Error.

In Error to the Supreme Court of the State of Vermont.

BRIEF FOR DEFENDANT IN ERROR.

On motion to dismiss the writ of Error.

STATEMENT OF THE CASE.

This is a criminal prosecution upon a complaint for unlawfully selling intoxicating liquors in violation of Sections 3800 and 3802 of the Revised Laws of Vermont. The respondent was a wholesale and retail liquor dealer at Whitehall, in the State of New York, and the unlawful acts complained of were the sales of intoxicating liquor made by him upon orders sent to him at Whitehall by residents of Rutland, in the State of Vermont, with directions to send the liquors to them by express, C. O. D., at Rutland. The question presented to the Supreme Court of Vermont was whether the sending the liquors to the parties ordering the same C. O. D. at Rutland was a sale of the same in the State of Vermont, or in the State of New York. The Supreme Court held that the Express Company was the agent of the respondent to consummate the sale in Vermont by delivering the liquors to the parties ordering the same, only upon condition that the price and express charges were paid, and that the sale was in Vermont.

The exceptions, set forth in full on pages 6, 7, 8, of the Transcript of Record, show fully all the questions raised in and decided by the Supreme Court of Vermont, and fail to show that any federal question was raised or decided in the case.

Sections 3800 and 3802 of the Revised Laws of Vermont apply wholly to sales made in Vermont, and by their terms do not in any way attempt to regulate the exportation or importation of liquors or interstate commerce in the same, and it is nowhere in the record suggested that the validity of these or any other statute of Vermont was drawn in question as being repugnant to the constitution, treaties or statutes of the United States.

Upon this record the defendant in error files the following motion to dismiss the writ of error:

"And now comes the defendant in error, and moves the "Court to dismiss the writ of error in the cause, for the reason "that it does not appear by the record that this honorable "Court has jurisdiction of the cause.

"This writ of error is to the Supreme Court of Vermont, and "it is therefore necessary that the record show that some one "of the questions described in the 25th Section of the Judiciary "Act, (Section 709 of the Revised Statutes), arose and was "decided in the State Court. The record fails to show this, "and the writ should therefore be dismissed."

In order to give this Court jurisdiction it must appear that the attention of the State Court "was called to the particular "clause of the Constitution of the United States, upon which "the party relied, and to the right he claimed under it, and "that with the question thus distinctly presented the decision "was against him." Taney, J. Farney v. Towle, 1 Black 350, (17, L. Ed. 216.)

Derby v. Gallup, 2 Wall., 97, (Book 17, L. Ed. 855.)
Edwards v. Elliot, 21 Wall., 532, (22 L. Ed. 487.)
Clark v. Pennsylvania, 128, U. S. 395, (32 L. Ed. 486.)

And for this purpose the petition for the writ of error, and assignment of errors, are of no assistance, being no part of the record of the State Court.

Farney v. Towle, and Clark v. Penn., *supra.*

Very much, as in the case last cited, the petition for this writ of error states that it was claimed by the Plaintiff in Error "that said statute if given such construction was void "as being repugnant to Section 8, of Article 1, of the Consti- "tution of the United States," but the petition is no part of the record of the Court below and no such question was presented by the exceptions, upon which the case was tried.

And if the Court were to look beyond the record into the published opinion of Royce, C. J., in the case, 58 Vt., 163, it would perceive that no federal question was presented in *this* case. In the two seizure cases tried with this case, State v. 4 Jugs, and State v. 68 Jugs Intoxicating Liquors National Express Company claimant, the opinion shows that it was claimed by the claimant that another Vermont statute authorizing the seizure was repugnant to Section 8 of the Federal Constitution. The Court answer the claim by saying that "no regu- "lation of or interference with interstate commerce is at- "tempted," etc.

The only exceptions that the respondent can claim presented a federal question to the Court below on the following:

"The respondent also requested the Court to charge the "jury that on the facts set forth in said admission (a written "admission of facts substantially as above set forth) 'they "'ought to find the respondent not guilty.'"

And "the Court charged the jury that if they believed the "facts set forth in said admission to be true, that the same "made a case upon which they should find a verdict of guilty "against the respondent, to all which the respondent ex- "cepted."

But these exceptions do not show that "the alleged right, "privilege or immunity was specially set forth and claimed in "the Court below." They are too general.

Clark v. Commonwealth of Penn., *supra.*

By its Attorney,

P. Redfield Pendell

Walter C. Denton

of Counsel

Supreme Court of the United States

OCTOBER TERM, 1889.

John O'Neil, Plaintiff in Error,
vs.
The State of Vermont.

BRIEF FOR DEFENDANT IN ERROR.

Some of the pertinent facts in the case, upon which the respondent was convicted, in addition to those stated in plaintiff's brief in the case, are these: The respondent at the same time that he delivered to said express company said liquors, also delivered bills of said liquors, which said carrier placed in an envelope marked C. O. D., which envelope had endorsed thereon among other things the following instructions:

Do not deliver the whole or any part of the good accompanying this bill until you have received pay therefor; be careful to notice what money you receive and as far as practicable send the same as received, and follow the special instructions of the shipper if any are given on the bills. If goods are refused or the parties cannot be found, notify the office from whence received, with names and dates, and await further instructions, meaning thereby that said express company should receive the amount of the bill accompanying the package upon its delivery to the consignee, and without payment of said bill, the liquor should not be delivered. That in the usual and ordinary course of business, the said express company delivered each of said packages to the consignee named upon the tag thereon, at Rutland, and at the same time and concurrently with such delivery received the amount of the said bill in the C. O. D. envelope, the amount of freight for

the transportation of said package from Whitehall to Rutland, and the charges for returning said money to the respondent at Whitehall. The express company placed said money for the payment of said bill in the same envelope and returned it to the respondent at Whitehall.

The respondent did nothing to or with said liquors after the said packages were delivered by him at said Whitehall to said common carrier, and the several consignees received the same and made payment as aforesaid at Rutland, as and under the contract made as aforesaid through the said orders so sent to the respondent at Whitehall.

I.

The view that the court took and the basis upon which this and the accompanying case against the respondent, for unlawfully keeping intoxicating liquor with intent to sell it were decided, is well stated by Veazey, J. 58 Vt., 146.

"If, in response to Hopkins' letter, O'Neil had taken the jug in his hand and come here with it, with a view of delivering it to Hopkins upon payment, probably no one would say but that at any time previous to the delivery it was his liquor, and if it was his intent to deliver it here, then he was owning and keeping it here with that intent. If instead of coming himself with it he had sent a clerk in his store with it, it would have been just as much his liquor as though he had brought it in person; it would have been his act by his agent. Instead of sending it by his own clerk, he made the express company his agent to bring it with precisely the same instructions."

We present the above pithy statement of the case for the purpose of suggesting to the court that this was the question presented to the court below, and that the claim of a federal question in this case was an afterthought. The case, as tried below, presented the question where the sale was made, whether in New York or Vermont, and the record is bare of any Federal question presented in *this* case.

The complaint, upon page 4 of the transcript, charges that the respondent, "at Rutland aforesaid," in the State of Vermont, "did

at divers times sell, furnish and give away intoxicating liquor without authority."

This complaint is under Section 3802 of the Revised Laws of Vermont, which prohibits sales of intoxicating liquor in the State of Vermont only. As appears by the exceptions, the prosecution undertook to prove sales made at Rutland, Vermont, and the court adjudged that the sales were made at Rutland. The course of dealing detailed in the transcript of record, shows that the office of the National Express Company at Rutland was turned into a kind of branch store or warehouse, for the respondent to retail his liquors in Vermont, hoping in this manner to successfully evade the penalties of the prohibitory law.

In this state of things, the court might well have taken the view that the respondent was virtually engaged in the business of retailing liquors at Rutland, and was therefore amenable to the law of Vermont, irrespective of the place of his residence, or where the negotiations for the sale thereof commenced. The complaint charged and the respondent was convicted of making sales of intoxicating liquor, not of making contracts for sales, which would have been harmless.

In the case of U. S. v. Shriver, 23 Fed. Rep., 134, the learned judge takes a similar view, holding that the sales were made where the liquors were delivered C. O. D. in this way, and that the seller must have a United States license to retail liquors at the place of delivery.

The above case illustrates the view taken by the Supreme Court of Vermont in this case; that the transactions detailed in the exceptions were simply sales at Rutland.

We are aware that in several cases of seizure of liquors in the possession of the National Express Company, tried at the same time with this case, and covered by one and the same opinion, the Court made some observations as to Section 8 of the Federal Constitution, among which is the following: "If the express company has in its possession within the State, liquor with intent to make unlawful use or disposition of it, then the right to seize it and prevent such unlawful use attaches."

In this case we contend that the respondent was convicted of acts committed at Rutland only; that his sales were made after the transit was at an end, and that the fact that his liquors were taken there by a common carrier, or that the orders were sent by mail, telegraph or express, had no bearing upon the case; that in this case no Federal question was presented or involved and whatever is said in the opinion upon this subject applies to the seizure cases only, in which the express company was claiming the liquors for the purpose of obtaining its express charges.

We do not understand the learned counsel for the respondent in his brief contends that Section 3802 of the Revised Laws of Vermont, as applied to sales made in Vermont, is invalid, but he contends that the court gave such construction and application of it as made it unconstitutional. This he has emphasized in his brief, p. 4, when, after saying that the specifications of error are "different specifications of one and the same question, viz.: Is the statute under which this prosecution proceeds, *as construed and applied in this case*, repugnant to the clause of the Constitution of the United States, which provides * * * * * that the Congress shall have power to regulate commerce, etc.

We contend that alleged error in construction or application of this statute would not give the court jurisdiction of the cause under the above specification of error.

Bank v. Buckingham's Exrs., 5 Howard, 317.

And we also contend that neither the case as set forth in the transcript nor the opinion, show that the constitutional question assigned by the respondent was presented to or decided by the court below, and the writ of error should therefore be dismissed.

Clark v. Pennsylvania, 128 U. S., 395.

The transcript of record is bare of any allusion to the statute here attacked, and it is clear that no question was made before the trial court as to the constitutionality of the statute upon which the respondent was convicted. In the petition for the writ of error, appears for the first time the claim that the statute *as construed by the Supreme Court of Vermont* is repugnant to Section 8, article 1, of the Constitution of the United States. But in Warfield v.

Chaffe, 91 U. S., 690, since the statute of 1867, construed to permit this court to look into the opinion of the State Court, it is said that "the objection that the note was not stamped, not having been made when the note was received in evidence, cannot now be considered."

II.

The State of Vermont has jealously guarded its police power by Art. 5 of its Bill of Rights, adopted July 2, 1877, which provides "that the people of this State, by their legal representatives have the sole, inherent, and exclusive right of governing and regulating the internal police of the same."

That it is strictly within the police power of a State to prohibit the manufacture and sale of intoxicating liquors within its limits, "is no longer an open question in this court." Kidd v. Pearson, 128 U. S., 1. Mugler v. Kansas, 123 U. S., 623. License cases, 5 Howard 504. Bartemeyer v. Iowa, 18 Wall., 129. Beer Co. v. Massachusetts, 97 U. S., 25. Foster v. Kansas, 112 U. S., 201. Prohibition statutes must always affect inter-state commerce more or less. They are not for that reason invalid.

The case of Woodruff v. Parham, 8 Wallace, 123, decides that the word import as used by Ch. J. Marshall in Brown v. Maryland, 12 Wheaton, 447, does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States, and the same is held in Hinson v. Lott, 8 Wall., 148, where a State statute laying a tax of fifty cents per gallon upon whisky brought into Alabama from a sister State, is held valid, and the right to tax property brought into a State from a sister State is established in Brown v. Houston, 114 U. S., 622, and in the License Cases. In Pierce v. New Hampshire, 5 Howard, 504, the respondent was convicted of selling the identical barrel of gin he had brought into New Hampshire from a sister State.

In the case of Kidd v. Pearson, *supra*, it is decided that the police power of the States is as broad and plenary as the taxing power. Citing Coe v. Errol, 116 U. S., 517, and a distillery for the manufacture of intoxicating liquor intended for export from the State

is declared a nuisance, and abated, affirming the judgment of the Supreme Court of Iowa.

The statute of Vermont, like the statute of Iowa, considered in the above case, excepts from seizure and condemnation, in Section 3819, Revised Laws, "liquors of foreign production * * imported under the laws of the United States and in accordance therewith * * contained in the original packages in which it is imported in quantities not less than laws of the United States prescribe." And in Section 3793, an agent in each town, appointed by the county commissioner, is authorized "as agent of the town to sell intoxicating liquor for medicinal, chemical and mechanical purposes only."

If, as in Brown v. Houston, affirming Woodruff v. Parham and Hinson v. Lott, *supra*, coal shipped from Pennsylvania to New Orleans, not yet unloaded from the vessel, and which might be transhipped to another port, is subject to taxation under the laws of Louisiana, and in Hinson v. Lott, whiskey, in the same barrels in which it was shipped into Mobile from another State for sale on commission, may be subject to a license tax, it would seem that the exercise of the police power of the State of Vermont, in this case has not been extended beyond its proper limits.

Of the police power of the States the court well observes in Fertilizing Co. v. Hydepark, 97 U. S., 659: "That power belonged to the States when the Federal Constitution was adopted. They did not surrender it then, and they all have it now." And in Railroad Co. v. Husen, 95 U. S., 465, it was distinctly declared that the delegation to Congress of the power to regulate commerce with foreign nations and among the States, "was not a surrender of what may be properly denominated police power," which included, the courts say, the power to adopt "precautionary measures against social evils, to prevent the spread of crime, pauperism or breach of peace." These measures are there said to be "self-defensive."

And when it is said, as it has often been said, that non-exercise by Congress of its power to regulate commerce between the States is equivalent to a declaration that commerce shall be free, we cannot conceive it was intended that the restraints placed by the State

upon the sale of various articles of commerce, may be freely overridden by citizens of neighboring States.

Take the case at bar, and follow it to the only conclusion that can be reached from such premises. It is said alcohol is an article of commerce. In the same sense opium, more acute poisons and dangerous explosives are merchantable. Almost every State in the Union has laws regulating the transportation and sale of these articles, different from neighboring States. Is it conceivable that the license given O'Neil in New York, and which make his business lawful there, should authorize him to flood Vermont with his liquors, where their sale is prohibited, under the guise of free commerce?

If the prohibitory law of New Hampshire does not prohibit an inhabitant of that State having in his possession any quantity of liquor, not intended for sale or use in New Hampshire, may he, because such possession is lawful there, send out his agents to solicit sales, and through the agency of common carriers practically annul the laws of other States, prohibition and license laws alike? or may the laws of the States relating to the storage and sale of poisons and explosives be evaded in the same manner?

If this be so, the right to pass "inspection laws, quarantine laws and health laws of every description," mentioned by Ch. J. Marshall in Gibbons v. Ogden, 9 Wheaton, 1, as "not surrendered to the general government," would be lame and impotent indeed. Such a construction of free commerce would lead to infinite confusion and mischief.

In the case of Kidd v. Pearson, 128 U. S., 16, the court distinctly say, referring to the decision of Mugler v. Kansas, *supra*: "The court decided that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said State; to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of property used for such forbidden purposes; and such legislation by a State is a clear exercise of her undisputed police power, which does not abridge the liberties or immunities of citizens of the United States."

If then, a State may, by proper legislation, abate such a nuisance, maintained by one of its own citizens within its limits, upon

what principle can it be said that a citizen of another State can defy her laws, indirectly accomplishing the same end, by using the warehouse of an express company for the storage and sale of intoxicating liquors? Granted that a State may not by her police regulations, discriminate against the commerce of other States, it should not, and does not follow that citizens of other States have greater rights in Vermont than her own citizens have.

Upon the ground of this contention, any other kind of nuisance might be thrust upon the people of a State against their expressed will. The warehouse of the carrier, with its consent, might be used for the storage and sale of matter for fertilizers, or the manufacture of fertilizers, or hides in such condition as to be deleterious to health, dangerous explosives—the catalogue is without limit, and in the absence of legislation of Congress the people would be powerless.

We contend that the case of Walling v. Michigan, 116 U. S., 446, does not sustain the contention of the plaintiff. In that case the statute imposed a tax upon persons not residing or having their principal place of business in Michigan, engaged there in soliciting the sale of intoxicating liquors. In answer to the suggestion by the State Court that the purpose of the act was an exercise of the police power to discourage the sale and use of intoxicating liquors the court said: "This would be a perfect justification of the act, if it did not discriminate against the citizens and products of other States in a matter of commerce between the States." This clearly implies that Hinson v. Lott, *supra*, is not overruled, and that if the tax had applied equally to citizens of Michigan, it would have been valid. In the same line are also, Gibbons v. Ogden, 9 Wheaton, 1; Brown v. Maryland, 12 Wheaton, 419, 436; Stone v. Mississippi, 101 U. S., 814, 816; Butchers' Union Co. v. Crescent City Co., 111 U. S., 746, 751; Gas Co. v. Light Co., 115 U. S., 650; Cooley Const. Lim., 581; Commonwealth v. Kendall, 12 Cush., 414; Munn v. Illinois, 94 U. S., 197; Patterson v. Kentucky, 97 U. S., 501; Smith v. Alabama, 124 U. S., 465.

Also as reaffirming the doctrine in the license cases that "legislation of Congress is essential to prohibit the action of the States thus considered:" County of Mobile v. Kimball, 102 U. S., 691,

701. Also Pierce v. New Hampshire, *supra*, in which Taney, Ch. J., says "the owner of the property (barrel of gin), who purchased it in Massachusetts is not an importer in the sense that term is used in the case of Brown v. Maryland.

In the same line are also the recent Iowa cases, Collins v. Hills, 41 N. W. Rep., 571, and Linsey v. Hardin, 43 N. W. Rep., 188. Also, Kohn v. Melchor, 29 Fed. Rep., 437; Colt J., Lang v. Lynch, 4 L. R. A., 839.

It is not important to consider the definition of the word "furnish" in Sec. 3800, or Sec. 3830, Vermont Revised Laws, set forth in plaintiff's brief, because neither of them is in any way applicable to this case. The complaint which we have given in substance above does not charge the respondent with any offense under Section 3810. The complaint is founded upon Section 3802, the evidence was wholly of sales of intoxicating liquors, and the record, page 9, shows that "the jury returned a verdict of three hundred and seven offenses of selling intoxicating liquors without authority;" also that the court adjudged the respondent guilty of the same number of offenses of *selling*, etc. The evidence is of sales, not *furnishing*. These observations also apply to the language of Sec. 3800 so far as it applies to the sale of wine for medicinal purposes only, made in the State, from grapes or other fruits, the growth of the State. The respondent was not convicted of selling wine.

It is, therefore, not important to consider the validity of these parts of the statute in this case. They were not involved, and were not considered by either of the State courts. They are separable from the statute upon which the respondent was convicted, and are, therefore, of no importance here.

Albany County v. Stanley, 105 U. S., 305.
Ex parte Kinnebrew, 35 Fed. Rep., 52.
Tiernan v. Rinker, 102 U. S. 123.

We do not understand that the recent decision, Bowman v. Chicago and N. W. R. R. Co., 125 U. S., 486, is in conflict with the former decisions of the court, upon the subject. The statute there under consideration was held to be so framed as to act upon commerce

before coming into the state, and that in forbidding common carriers to bring into the state and deliver intoxicating liquors to any person unless he is licensed to sell the same, it is repugnant to Article 8 of the constitution of the United States. This statute would, strictly construed, prohibit a person from purchasing liquors in another state for his own use, and bring it by common carrier to his own state.

But this is a case where the carrier is used to perfect and complete a sale; and the respondent, we contend, stands no more within the immunity of the constitution than he would if he came by railroad himself, brought the liquors with him and delivered them, or brought them by a special car and afterwards delivered them himself with a delivery wagon.

We are aware that this is a case of great importance. The contention of the respondent for free commerce in intoxicating liquors, if sustained, will practically render nugatory the legislation of all the States upon the subject, and that, too, before Congress has undertaken to provide any substitute legislation. It cannot be that the framers of the constitution did not foresee that the people of the different States would take, and ought to take, different views upon this and kindred subjects, as their situations and circumstances might require. We contend that they did, and made wise provision for it in conceding to the States the right of regulating and governing their internal police; that this statute is one coming within the police power of a State; that it does not regulate commerce among the States, nor affect it further than police regulations ought and must; that this judgment is in direct line with all the decisions of this court upon the subject, and ought to be affirmed.

WALTER C. DUNTON
and P. REDFIELD KENDALL,
Attorneys.

As to the amenability of persons without jurisdictions for offences committed within, see 1 Comst., 173; 3 Denio, 190; 2 Sumner, 482; 2 Wash. C. C., 99; 3 Conn., 1; 3 Pick., 304; 7 Sergt. & R., 469; 17 Ark., 561; 7 Sneedes & Marshall, 380; 6 Cox C. C., 260.

As to the scope of the exceptions, see 57 Vt., 654; 60 Vt., 37.